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Blockbuster Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NETFLIX, INC., a Delaware corporation,

Plaintiff,

vs.

BLOCKBUSTER INC., a Delaware corporation,
DOES 1-50,

Defendants.

AND RELATED COUNTER ACTION.

CASE NO. C 06 2361 WHA (JCS)

**DECLARATION OF WILLIAM J.
O'BRIEN IN SUPPORT OF
BLOCKBUSTER'S MOTION TO
COMPEL FURTHER RESPONSES
TO BLOCKBUSTER'S FIRST SET
OF REQUESTS FOR PRODUCTION**

Hearing Date: Dec. 8, 2006
 Time: 9:30 A.M.
 Courtroom: A, 15th Floor
 Judge: Hon. Joseph C Spero
 Complaint Filed: April 4, 2006

I, William J. O'Brien, declare:

Introduction

1. I am an attorney duly admitted to practice before this Court and a partner in the law firm of Alschuler Grossman Stein & Kahan LLP, counsel of record for Defendant and Counterclaimant, Blockbuster Inc., in this case. I am a patent litigator with significant trial and appellate experience. Together with my partner Marshall B. Grossman, I am heading up the representation of Blockbuster in this case.

2. I am familiar with the proceedings in this case, including court filings, discovery, and correspondence. I have personal knowledge of facts stated below except insofar as another source of information is identified.

Blockbuster's Service of Requests for Production and Special Notice to Netflix Counsel About Them

3. I caused Blockbuster's First Set of Requests for Production and First Set of Interrogatories to be delivered to the offices of counsel of record for Plaintiff and Counter-Defendant, Netflix, Inc., Keker & Van Nest, LLP, on July 11, 2006. A true and correct copy of the Requests, which are the subject of Blockbuster's present motion, is Exhibit A to this Declaration. In addition, the specific requests at issue in this motion – and Netflix's written responses to them – are reprinted verbatim in Paragraphs 55 through 59 below.

4. Because Blockbuster's Requests for Production had been served together with the Interrogatories on July 11, Netflix's written responses to the Request for Production were due on August 10, the same date when Netflix's Interrogatory Answers were originally due. On Page 1 of the Requests for Production, Blockbuster asked that the requested documents be produced on August 14, 2006.

5. On July 11, 2006, the same day that the Requests and Interrogatories were served, I sent an email to Daralyn Durie of Keker & Van Nest, notifying her of the service and attaching copies of the Requests and Interrogatories. A true and correct copy of that email is Exhibit B to this Declaration. In the email, I also gave Ms. Durie a special "heads-up" that Blockbuster needed discovery responses before the August 17 hearing on Netflix's motion to dismiss:

I want to give you a heads-up at the outset that, while we are usually inclined to be liberal with extensions of time, these sets of discovery requests present a special case, because they are largely directed to facts implicated by Netflix's pending motion to dismiss. In that motion, as you know, Netflix attacks the facts alleged in support of certain Blockbuster defenses and counterclaims as insufficient and argues for the inadequacy of Blockbuster's allegations made on information and belief. While we believe that our allegations are both proper and adequate to support our claims and defenses, we need to be in a position to advise the Court at the hearing of what further allegations we can add if we are required to amend our pleading.

1 6. In closing, I stated that, “[i]f there are any problems we will need to
2 address with regard to the discovery requests, I would appreciate your contacting me as early as
3 possible about them.”

4 7. I never received any response from Netflix’s counsel to my July 11 email.

5 **Netflix’s Request For An Extension of Time to Answer Interrogatories – But Not to**
6 **Respond to Requests for Production**

7 8. On August 4, 2006, however, I received a telephone call from Leo Lam of
8 Keker & Van Nest. Mr. Lam requested an extension of Netflix’s time to answer the First Set of
9 Interrogatories from August 10 to August 14. During this conversation, I told Mr. Lam about my
10 July 11 email to Ms. Durie and about the time-sensitivity of receiving the discovery that
11 Blockbuster had requested that day in view of the August 17 hearing.

12 9. In this context, Mr. Lam and I referred in passing on August 4 to
13 Blockbuster’s First Set of Requests for Production. While Mr. Lam was thus aware of the
14 Requests, he never requested any extension of time with regard to them, and Blockbuster never
15 granted any such extension. Further, contrary to his later assertions, Mr. Lam never said anything
16 to me on August 4 to indicate that he was under a misapprehension as to when the written
17 responses to Blockbuster’s First Set of Requests for Production were due or that he did not know
18 that the written responses were due on August 10. Because the Requests for Production had been
19 served together with the Interrogatories on July 11, and because written responses, like
20 interrogatory answers, are due thirty days after service, it appeared obvious to me that the
21 deadline for written responses was the same as the August 10 deadline for answering the
22 Interrogatories. It never entered into my mind that Mr. Lam was under any misapprehension
23 about this seemingly obvious point until August 11, when he asserted for the first time that the
24 written responses were not due until August 14.

25 10. Despite the ongoing concerns of Blockbuster’s counsel about the time-
26 sensitivity of the requested discovery, I granted Netflix the extension requested by Mr. Lam and
27 sent him a confirming email a few minutes later. A true and correct copy of my August 4
28 confirming email is Exhibit C to this Declaration. As the email reflects, the extension that I

1 granted to Mr. Lam applied only to “Netflix’s time to answer Blockbuster’s first set of
2 interrogatories” There is no reference to Blockbuster’s Requests for Production anywhere in
3 the email.

4 11. Mr. Lam did not challenge the accuracy of my August 4 email
5 confirmation of our conversation and of the scope of the extension granted.¹

6 **Netflix’s Untimely Written Responses to Blockbuster’s Requests for Production**

7 12. Blockbuster’s counsel did not receive written responses to Blockbuster’s
8 Requests for Production on August 10, 2006, when they were due. No such responses were
9 served or received until August 14, 2006. On August 11, 2006, I called Mr. Lam, and we spoke
10 by telephone twice during that day. In the first of these conversations, Mr. Lam told me – for the
11 first time – that he believed the written responses to Blockbuster’s Requests for Production were
12 not due until August 14. Initially, Mr. Lam asserted that my August 4 email had said that
13 Netflix’s written responses were due on August 14. He retracted this assertion when I read him
14 my August 4 email (Exhibit C), which neither said nor implied anything of the sort. Thereafter,
15 despite repeated requests on my part, Mr. Lam was not able – then or in later conversations – to
16 articulate any specific reason why he had believed that to be the case. He merely said that this
17 was an “inherited impression.” Exhibit D to this declaration is a true and correct copy of a letter I
18 sent Mr. Lam on August 14, concerning our telephone conversations of August 11.

19 13. Exhibit E is a true and correct copy of Netflix’s written responses to
20 Blockbuster’s First Set Requests for Production. Blockbuster’s counsel first received these
21 responses on August 14, 2006, which, according to the attached proof of service, is also the date
22 when they were served.

23 14. In its written responses, Netflix has asserted objections to every one of
24 Blockbuster’s 134 Requests. As one example, Netflix has objected even to Request No. 133,
25 which merely asked for the items that Netflix had listed in its Initial Disclosures as Rule
26 26(a)(1)(b) documents. Netflix also objected to producing, and refused to produce, certain patent

27 ¹ As recounted below, Mr. Lam did later assert that, in this email, I had represented that the
28 written responses to Blockbuster’s First Set of Requests for Production were due August 14.
However, once I read him the email, Mr. Lam retracted that assertion.

1 filings, prior art that disclosed features claimed in the patents-in-suit, and other documents as
2 described below.

3 **Netflix's Efforts to Excuse Its Untimely Responses**

4 15. Exhibit F to this declaration is a true and correct copy of a letter I received
5 from Mr. Lam on August 14, 2006, in response to my letter to him of that date (Exhibit D). In the
6 third paragraph of his August 14 letter, Mr. Lam asserts, "When I requested and you granted on
7 August 4 and extension of time until August 14 to respond to Blockbuster's interrogatories, I told
8 you that Netflix wanted to provide its interrogatory responses on the same day that Netflix's
9 written responses to Blockbuster's RFPs were due, on Monday, August 14." That statement by
10 Mr. Lam is incorrect. Mr. Lam's recollection about what he told me in this regard is no more
11 accurate than his incorrect recollection that my August 4 email had said that the written responses
12 were due on August 14. Only after I reputed that incorrect assertion did Mr. Lam switch to
13 reliance on a supposed statement that was oral rather than in writing.

14 16. Similarly, during our initial telephone conversation on August 14, Mr. Lam
15 denied that Blockbuster's requests for production specified a requested production date, even
16 though that date appears prominently on the first page of the requests. While I do not question
17 the sincerity of Mr. Lam's belief in his stated recollection, it does not correspond to the facts of
18 what occurred.

19 17. Mr. Lam is particularly off-base in suggesting that I withheld a correction
20 of his professed mistake in order to "wait and claim 'gotcha'" In reality, I would gladly
21 have corrected Mr. Lam if he had told me that he believed the written responses were due on
22 August 14, but he made no such assertion on August 4, and the thought never entered my mind
23 that he was unaware of the seemingly obvious response date. On August 11, when Mr. Lam
24 asserted for the first time that the written responses were due on August 14, I did immediately
25 correct him. Until then, I had no occasion or opportunity to do so.

Efforts at Compromise Resolution

18. Counsel have extensively discussed, and attempted to resolve, numerous issues regarding Netflix's responses to Blockbuster's First Set of Requests for Production.² We have successfully resolved some issues by agreement, but have been unable to resolve others and need the assistance of the Court in doing so.³

19. As noted above, I contacted Netflix's counsel by email about Blockbuster's First Set of Requests for Production on July 11, 2006 – the same day they were served – and I spoke by telephone with Netflix's counsel about the requests on August 11, 2006, 31 days after service. Thereafter, counsel have conferred for multiple hours, in person and by telephone, about issues related to Netflix's responses to the requests for production. These discussions have included telephone conferences between my colleague Dominique Thomas and me and Leo Lam, Eugene Paige, and Ashok Ramani of Keker & Van Nest LLP

20. The communications that I have sent to opposing counsel in an attempt to resolve issues about Blockbuster's Requests for Production have included an August 25, 2006, letter to Daralyn Durie about the production requests, a true and correct copy of which is Exhibit G to this Declaration, and an August 31 letter to Eugene Paige, a true and correct copy of which is Exhibit H, in addition to my August 14 letter to Mr. Lam (Exhibit D.)⁴ My 11-page letter of August 31 (Exhibit H) confirmed a telephone conference of approximately one and one-half hours.

21. Even so, Mr. Paige suggested, in a letter of September 1, 2006, that we had not yet fully conferred on all issues. (A true and correct copy of Mr. Paige's September 1, 2006, letter is Exhibit J to this declaration.) I therefore had another long telephone conference with Mr. Paige about the Requests for Production on September 5. At the conclusion of that

² A description of these efforts is also included in counsel's joint letter attached as Exhibit 1 to Blockbuster's Motion to Compel Further Responses to Requests for Production.

³ Additionally, Blockbuster reserves all rights to seek additional relief if it becomes necessary to do so based on future developments, such as any failure by Netflix to produce documents as agreed. Netflix has not yet completed the agreed production of documents.

⁴ Mr. Lam referred me to Mr. Paige in a letter dated August 30, 2006, a true and correct copy of which is Exhibit I to this declaration.

1 conversation, he expressed satisfaction that we had addressed the issues raised in his September 1
2 letter.

3 22. Additionally, on October 13, 2006, I traveled to San Francisco and met
4 personally with Jeffrey Chanin and Gene Paige of Keker & Van Nest. Prior to that meeting, I
5 sent Messrs. Chanin and Paige a draft of a proposed joint letter regarding Blockbuster's intended
6 motion to compel further responses to its first set of requests for production. A true and correct
7 copy of that draft is Exhibit K to this declaration. During the afternoon and evening of
8 October 13, we discussed Blockbuster's Requests for Production, Blockbuster's intended motion
9 to compel further responses to those Requests, and the draft of the joint letter. My partner
10 Marshall Grossman participated in this conversation by telephone. At the conference, we were
11 unable to reach agreement on any of the issues addressed in Blockbuster's present motion.

12 **Background for the Requests for Production**

13 **The Pleadings**

14 23. The currently operative pleadings in this case are:

15 a. Netflix's First Amended Complaint for Patent Infringement and
16 Demand for Jury Trial (Document 28, filed July 26, 2006), a true and correct copy of
17 which is Exhibit L to this declaration;

18 b. Blockbuster's Answer to First Amended Complaint; Counterclaims;
19 Demand for Jury Trial (Document 43, filed September 11, 2006), a true and correct copy
20 of which is Exhibit M to this declaration; and

21 c. Netflix's Reply to Defendant's Counterclaims (document 50, filed
22 October 2, 2006), a true and correct copy of which is Exhibit N to this declaration.

23 24. In its First Amended Complaint (Exhibit L), Netflix accuses Blockbuster of
24 infringing two patents, U.S. Patent No. 7,024,381 (Exhibit A to the First Amended Complaint)
25 and U.S. Patent No. 6,584,450 (Exhibit B to the First Amended Complaint).

26 25. In its Answer (Exhibit M), Blockbuster asserts multiple affirmative
27 defenses and counterclaims. Blockbuster's affirmative defenses include:
28

1 a. That Netflix's patents are invalid for anticipation under 35 U.S.C.
2 §102 because they claim subject matter already disclosed in the prior art;

3 b. That Netflix's patent claims were obvious in view of prior art and
4 therefore unpatentable under 35 U.S.C. § 103;

5 c. That Netflix's patents are unenforceable because of inequitable
6 conduct in obtaining the patents, including the failure to disclose material prior art;

7 d. That Netflix has misused its patents and is therefore barred from
8 asserting them against Blockbuster;

9 e. That Netflix's patent claims are invalid under 35 U.S.C. § 112, ¶ 1
10 because of failure by the Netflix inventors to disclose, in the patent applications and
11 patents, what they regarded as the best way or "best mode" of practicing the claimed
12 inventions.

13 26. Blockbuster's affirmative defenses of invalidity, unenforceability and
14 patent misuse are set forth in Paragraphs 60-72 of the Answer.

15 27. Blockbuster also asserts affirmative defenses of laches (Paragraphs 73
16 through 77 of the Answer) and estoppel (Paragraphs 78 through 80 of the Answer).

17 28. Blockbuster's counterclaims include allegations that Netflix has engaged in
18 monopolization and attempted monopolization in violation of Section 2 of the Sherman Antitrust
19 Act, 15 U.S.C. § 2, through fraudulently obtaining its patents-in-suit and baselessly asserting them
20 in sham litigation against Blockbuster. Blockbuster's antitrust counterclaims and related
21 allegations about interstate commerce and the relevant market are set forth in Paragraphs 88
22 through 119 of the Answer. Facts common to both Blockbuster's affirmative defenses and its
23 counterclaims are set forth in Paragraphs 16 through 59 of the Answer.

24 29. In Netflix's Reply (Exhibit N) to Blockbuster's Counterclaims (Exhibit M),
25 Netflix admits, in Paragraph 98, that it "did not cite any prior art" to the Patent Office during the
26 pendency of the application for the '450 patent, which is the first of Netflix's two patents-in-suit.

27 30. Netflix admits, in Paragraph 31 of the Reply, "that certain specific
28 individuals, including the named inventors and the attorneys who prosecuted the patent

1 applications, owed a duty of candor to the Patent and Trademark Office pursuant to 37 C.F.R.
2 §1.56(c).” Netflix admits, in Paragraphs 35 and 36 of the Reply, that Netflix’s named inventors
3 signed a “declaration and power of attorney [that] includes a paragraph that states: ‘I
4 acknowledge a duty to disclose information which is known to me to be material to patentability
5 in accordance with Title 37, Code of Federal Regulations 1.56.’”

6 31. In Paragraph 44 of its Reply “Netflix admits that it was aware of the
7 existence of certain patents purportedly owned by NCR during the pendency of the applications
8 for the ’450 and ’381 patents.” In Paragraph 52, “Netflix admits that it did not disclose the NCR
9 patents to the Patent Office in conjunction with the ’381 patent.” Additionally, in Paragraph 44,
10 “Netflix admits that it was aware of the existence of HBO, Showtime, and TiVo while the
11 applications were [for the ’450 and ’381 patents] were pending.”

12 **Netflix’s Unsuccessful Motion to Dismiss**

13 32. On July 6, 2006, Netflix filed a Motion to Dismiss Blockbuster’s antitrust
14 counterclaims and to strike Blockbuster’s defenses of inequitable conduct and patent misuse.
15 After briefing and argument, this Court denied Netflix’s motion in its entirety. A true and correct
16 copy of the Court’s order (Document 40, filed August 22, 2006) is Exhibit O to this declaration.

17 33. On Page 8, Lines 21-28 of the Court’s order denying Netflix’s motion to
18 dismiss (Exhibit O), the Court states:

19 Netflix disclosed absolutely *no* prior art in applying for the ’450
20 patent. Shortly after that patent issued, Netflix suddenly
21 bombarded the PTO examiner with over one hundred references in
22 support of the ’381 patent (but not the NCR patents). This is so
23 even though the same law firm prosecuted both patent applications,
24 and even though the same named inventors were responsible for
25 both applications. For Netflix’s later patent, the PTO examiner
26 would have needed to swim through a morass of references and
27 then go beyond that morass to find the NCR patents.

28 34. Exhibit P to this declaration is a true and correct copy of the reply that
Netflix filed in support of its motion to dismiss (Document 36, filed August 3, 2006). In
Footnote 5 on Pages 5 and 6 of this reply, Netflix cited cases in which materiality of omitted prior
art was supported by references to that art in Patent Office proceedings. Netflix argued, “Here,

Blockbuster does not allege the PTO cited the NCR patents against Netflix.” For example, Netflix cited *Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864 (S.D.N.Y. 1986), saying, “the court in *Papst* noted that the claimant specifically alleged that (1) a patent examiner working on a companion patent application had discussed the omitted prior-art patent with prosecution counsel, and (2) prosecution counsel in fact referred to the omitted prior-art patent in an amendment while prosecuting the companion application.”

Netflix’s Disclosures About Its Contentions

35. Exhibit Q to this declaration is a true and correct copy of Netflix’s Amended Initial Disclosures under Rule 26 of the Federal Rules of Civil Procedure, dated July 28, 2006. At Page 5, Lines 13 through 20 of these Disclosures, Netflix states that it contends that it has lost profits as a result of Blockbuster’s allegedly infringing activity, including lost profits from lost subscribers and from price erosion, but Netflix does not provide any details are amounts of such alleged damages. At Page 5, Lines 21 through 25 of these Disclosures, Netflix further states that it is entitled to a reasonable royalty from Blockbuster’s alleged infringement, but Netflix does not specify any rate, calculation, or amount for such a royalty.

36. Exhibit R to this declaration is a true and correct copy of the [Amended][Corrected] Netflix’s Disclosure of Asserted Claims and Preliminary Contentions for U.S. Patent Nos. 7,024,381 and 6,584,450 (Document 31, filed July 28, 2006. On Page 2 at Lines 5 through 7 of this [Amended][Corrected] Disclosure, Netflix states:

Wishing to preserve its right to rely on the assertion that its own methods and systems practice the claimed invention pursuant to Patent L.R. 3-1(f), Netflix discloses that it practices each asserted claim in both the ’391 [sic] and ’450 Patents.

37. Exhibit A to the [Amended] [Corrected] Disclosure is a table submitted by Netflix purporting to compare the Blockbuster Online service identified as “the accused instrumentality” to multiple asserted claims of Netflix’s ’381 patent. On Page 13 of Exhibit A to the [Amended][Corrected] Disclosure, Netflix purports to compare Blockbuster Online to Claim 34 of the ’381 patent. In doing so, Netflix breaks Claim 34 into portions designated as “34a” through “34e”. The portion of the claim designated as 34a reads, “establishing over the

Internet a rental agreement with a customer that provides for charging the customer a periodic fee.” Referring to the other portions of Claim 34, Netflix merely refers to its preceding Contentions 1a through 1e, which appear on Pages 1-3 of Exhibit A to the [Amended][Corrected] Disclosure and purport to compare Blockbuster Online to Claim 1 of the ’381 patent. Based on the [Amended][Corrected] Disclosure, the understanding of Blockbuster’s counsel is that Netflix contends that Blockbuster infringes Claim 23 of the ’381 patent for the same reasons it allegedly infringes Claim 1, with the sole distinction being Claim 34’s addition of the requirement for “establishing over the Internet a rental agreement with a customer that provides for charging the customer a periodic fee” (portion 34a).

Blockbuster’s Invalidity Contentions

38. Blockbuster’s filings disclosing its Preliminary Invalidity Contentions provide further information about issues in this case. Exhibit X to this Declaration is a true and correct copy of Blockbuster’s Invalidity Contentions for U.S. Patent No. 6,584,450 (Document 45, filed September 18, 2006), while Exhibit Y is a true and correct copy of Blockbuster’s Preliminary Invalidity Contentions for U.S. Patent No. 7,024,381 (Document 46, filed September 18, 2006).⁵

39. For example, information about Blockbuster’s best-mode defenses with regard to the ’450 patent is provided at Page 6, Line 14 through Page 7, Line 13 of Exhibit X. Information about Blockbuster’s best-mode defenses as to the ’381 patent is provided at Page 6, Lines 1 through 27 of Exhibit Y. As stated in these documents, Blockbuster’s best-mode defenses include that claims of the ’450 and ’381 patents recite selecting movies or other items for delivery to a customer but do not disclose any mode of selecting items or movies that prioritizes between requests of different customers. For instance, the patents do not disclose any mode of selecting movies or other items that takes into account how often a customer returns

⁵ Blockbuster’s detailed charts concerning prior art supporting its invalidity contentions are not included in these exhibits because of their bulk. Inclusion of these charts would have resulted in submission of approximately 824 pages with respect to the ’450 patent and approximately 628 pages with respect to the ’381 patent.

1 them and receives new ones, nor any step method, device, or feature for anything known or
2 described as “throttling.”

3 40. As further reflected in Exhibits X and Y, Blockbuster contends that claims
4 of the ’450 and ’381 patents recite delivery of moves or other items to customers and delivery by
5 mail but do not disclose any particular type, design, or features for the envelope or package used
6 for such delivery or for return of movies or other items by a customer.

7 **“Throttling” and the Related Class Action Against Netflix**

8 41. During our investigation for this case, Blockbuster’s counsel have become
9 aware of a recently settled class action lawsuit against Netflix, *Frank Chavez v. Netflix, Inc.*, Case
10 No. CGC-04-434884 in the Superior Court for the State of California for the City and County of
11 San Francisco. Exhibit S to this Declaration is a true and correct copy of the Complaint in that
12 case, obtained from the San Francisco Superior Court’s case file. In Paragraph 32 on Pages 8 and
13 9 of this Complaint, the class-action plaintiff alleges that Netflix “intentionally designed their
14 business processes and operating software so as to increase the delivery times to many
15 customers . . . and to significantly decrease and/or limit the number of DVDs that can be rented in
16 a month.” The class-action plaintiff goes on to provide some particulars of the alleged Netflix
17 conduct at issue. For example, in Sub-Paragraph 32a, he alleges that Netflix “prioritize[d]
18 shipping DVDs . . . to account holders who have rented the fewest DVDs in prior months.
19 Customers who rent the fewest DVDs per month are the most profitable. . . .”

20 42. In Paragraph 35 on Page 11 of the Class Action Complaint, it is alleged
21 that Netflix’s conduct “unfairly disadvantages” competitors – such as Blockbuster – “who more
22 accurately disclose their delivery times.”

23 43. This class action lawsuit and Netflix’s “throttling” practices received
24 considerable attention in the media and on the Internet. Exhibit T is a true and correct copy of a
25 typical article on the case from *DVD Rental News*, dated February 10, 2006.

26 44. Exhibit U is a copy of the Order Approving Settlement of the *Chavez* class
27 action, dated April 28, 2006, and signed by the Hon. Thomas J. Mellon, Jr., of the San Francisco
28 Superior Court. Blockbuster’s counsel obtained this document from the Superior Court case file.

1 45. Netflix's patents-in-suit (Exhibits A and B to Netflix's First Amended
2 Complaint, which is Exhibit L to this declaration) do not provide any disclosure concerning
3 "throttling" or other procedures for prioritizing between requests of different customers as
4 described in the *Chavez* Class Action Complaint.

5 **Other Information Received About Netflix**

6 46. Exhibit V to this declaration is a true and correct copy of an article found
7 by Blockbuster's counsel on the Internet at the website "MarketingProfs.com," dated April 11,
8 2006 and entitled "Five Lessons From the Netflix Startup Story." The article is co-authored by
9 Jim Cook, who is described on Page 5 of the article as "a Netflix cofounder." On Pages 1 through
10 3 of the article, Mr. Cook describes issues addressed by Netflix with regard to U.S. Postal Service
11 operations and packaging. Among other things, Mr. Cook states, on Page 2:

12 In short, we figured out a way to make it all work. . . .

13 We knew that if we didn't find a way to work within the US Post
14 Office's systems, we wouldn't succeed. . . . To understand how the
15 Post Office backend worked, I spent hundred of hours at a few of
16 the largest regional Postal Centers, observing and asking tons of
17 questions.

18 I noticed letters being sorted by several high spinning circular
19 drums. . . . [I]t was obvious that a thin plastic DVD would not
20 survive the journey. . . .

21 I found out that if an envelope had certain dimensions and other
22 characteristics, it would be sorted by [an] alternative system instead
23 of the large, crushing metal drums. . . .

24 Our resulting "Netflix envelope" was one of the biggest "customer
25 wows." Its design was critical not only for the customer experience
26 but also for our operations and business mode. We had to design
27 the envelope so that it met several criteria

28 47. Mr. Cook's article (Exhibit V) also includes a section on Page 4 entitled
"Copy the best." Mr. Cook states, "When designing the Netflix Web site we turned to the best:
Amazon." He proceeds to list six "ideas that we adapted [from Amazon] for the Netflix Web
site"

 48. Exhibit W to this declaration is a true and correct copy of an email dated
February 7, 2006 received Blockbuster through the email address

1 “investor.relations@blockbuster.com.” The email is if from a postal employee named William
 2 Grubb, who advised Netflix of special processing procedures in use on behalf of Netflix (but not
 3 Blockbuster) at the Post Office where he works.⁶

4 49. Netflix’s patents-in-suit (Exhibits A and B to Netflix’s First Amended
 5 Complaint, which is Exhibit L to this declaration) do not provide any disclosure concerning
 6 Postal Service machinery or systems, special postal processing procedures, or envelope design.
 7 In fact, the patents do not mention envelopes at all.

8 **Blockbuster’s Attempts to Gather Evidence About Claimed Features in the Prior Art**

9 50. Blockbuster has conducted an extensive search for prior art disclosing
 10 features claimed in the patents-in-suit. Blockbuster wishes to use such prior art to support its
 11 invalidity defenses of anticipation and obviousness. In addition, to the extent that Blockbuster
 12 can establish knowledge by Netflix of material undisclosed prior art, it intends to use such
 13 information to support its inequitable conduct defenses and antitrust counterclaims.

14 51. Netflix’s ’450 patent bears an application filing date of April 28, 2000.
 15 The ’381 patent claims priority of that application as well. Blockbuster’s prior art search is
 16 therefore focused on prior art existing as of April 28, 1999 – one year before Netflix’s claimed
 17 priority date. For example, under 35 U.S.C. § 102(b), a person is not entitled to a patent if “the
 18 invention was patented or described in a printed publication in this or a foreign country or in
 19 public use or on sale in this country, more than one year prior to the date of the application for
 20 patent in the United States”

21 52. Many of the Requests for Production now in dispute with Netflix constitute
 22 attempts by Blockbuster to identify relevant prior art and, especially, prior art known to Netflix
 23 but not disclosed by it to the Patent and Trademark Office in obtaining the patents-in-suit. Such
 24 Requests include Nos. 32, 34-36, 55-57, 67-71, 73-74, 78-81, 86, 88-90, 93-100, 105, 113-17, and
 25 119.

26
 27
 28 ⁶ Material reflecting subsequent forwarding of Mr. Grubb’s email has been omitted from Exhibit W.

53. Of these Requests, Nos. 32, 34, 35, and 36 request documents related to particular prior art businesses or categories of prior art businesses, such as HBO, Showtime, or other subscription cable or satellite television services or pay television services in existence before April 28, 1999 (Request No. 32), Webvan, Homegrocer.com, or other Internet grocery service in existence before April 28, 1999 (Request No. 34), Amazon.com (Request No. 35), and eBay (Request No. 36).

54. The remainder of the prior-art related Requests seek information pre-dating April 28, 1999, concerning prior art that included various features that Netflix has included in claims in the patents-in-suit. The following table provides illustrative comparisons between features in these Requests for Production and features recited in Claims of the '381 and '450 patents:

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
"computer-implemented rental of movies to a customer" (Request No. 55) "computer-implemented rental of movies to customers" (Request No. 56)	"A computer-implemented method for renting movies to customers . . ." ('381 patent, Claims 1, 14, 24, 34) "A method for renting items to customers, the method comprising the computer-implemented steps [described below]." ('450 patent, Claims 1, 16, 31) "A computer-readable medium for renting items to customers, the computer-readable medium carrying one or more sequences of one or more instructions which, when executed by one or more processors, cause the one or more processors to perform the computer-implemented steps [described below]." ('450 patent, Claims 36, 81)
"providing electronic digital information that caused one or more attributes of movies to be displayed" (Request No. 57)	"providing electronic digital information that causes one or more attributes of movies to be displayed . . ." ('381 patent, Claims 1, 14, 24, 34, 44)
"a rental agreement that provided for a periodic fee" (Request No. 67)	"a rental agreement with a customer that provides for charging the customer a periodic fee . . ." ('381 patent, Claim 34)
"establishing a rental agreement over the Internet" (Request No. 68)	"establishing over the Internet a rental agreement . . ." ('381 patent, Claim 34)
"shipping a movie only if a fee was current" (Request No. 69)	"if the customer is current on the periodic fee, selecting another movie based upon the order of the list and causing the selected movie to be delivered to the customer . . ." ('381 patent, Claim 34)

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
"computer system for renting movies" (Request No. 70)	"A computer system for renting movies to customers . . ." ('381 patent, Claim 44) "An apparatus for renting items to customers comprising . . . one or more processors . . ." ('450 patent, Claim 51)
"renting movies using a computer coupled to a digital telecommunications network" (Request No. 71)	"A computer system for renting movies to customers, comprising: . . . a computer that is coupled to a digital telecommunications network . . ." ('381 patent, Claim 44)
"renting movies using a computer with electronic digital memory" (Request No. 73)	"A computer system for renting movies to customers, comprising: . . . a computer [and] an electronic digital memory in the computer . . ." ('381 patent, Claim 44) "An apparatus for renting items to customers comprising . . . a memory communicatively coupled to the one or more processors . . ." ('450 patent, Claim 51)
"renting movies using a computer with programs stored in memory causing the computer to perform steps" (Request No. 74)	"A computer system for renting movies to customers, comprising: . . . a computer . . . ; an electronic digital memory in the computer [and] one or more sequences of computer program instructions stored in the electronic digital memory which, when executed, cause the computer to perform the steps [described below]." ('381 patent, Claim 44) "An apparatus for renting items to customers comprising . . . a memory communicatively coupled to the one or more processors, the memory including one or more sequences of one or more instructions which, when executed by the one or more processors, cause the one or more processors to perform the steps [described below]." ('450 patent, Claim 51)
"computer-implemented method in which two or more movies for renting to a customer are selected by a customer" (Request No. 78)	"A computer-implemented method as recited in claim 1 [or 14 or 24 or 34], wherein the two or more movies for renting to the customer are selected by the customer." ('381 patent, Claims 5, 18, 28, 38)
"determining the order of two or more movies based upon one or more preferences of a customer" (Request No. 79)	"A computer-implemented method as recited in claim 1 [or 14 or 24], further comprising determining the order of the two or more movies based upon one or more preferences of the customer." ('381 patent, Claims 6, 19, 29)
"delivery of a selected movie by mail" (Request No. 80)	"A computer-implemented method as recited in claim 1 [or 14 or 24 or 34 or 44], wherein the delivery of the selected movie comprises delivery by mail." ('381 patent, Claims 7, 20, 30, 40, 48) "A method as recited in claim 31, wherein movies are provided to the customer by mail." ('450 patent, Claim 34) "A computer-readable medium as recited in

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
	claim 96, wherein movies are provided to the customer by mail.” (’450 patent, Claim 99)
“delivery of a selected movie by mail on one or more optical media” (Request No. 81)	“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34 or 44], wherein the delivery of the selected movie comprises delivery by mail on one or more optical media.” (’381 patent, Claims 8, 21, 31, 41, 49)
“rental of any of motion pictures, television series, documentaries, cartoons, music videos, video recordings of concert performances, instructional programs, or educational programs” (Request No. 86)	“A method as recited in claim 1, wherein the movies comprise any of motion pictures, television series, documentaries, cartoons, music videos, video recordings of concert performances, instructional programs, and educational programs.” (’381 patent, Claim 13)
“providing a customer up to a specified number of items indicated by one or more selection criteria” (Request No. 88)	“providing to the customer up to a specified number of the one or more items indicated by the one or more item selection criteria . . .” (’450 patent, Claims 1, 16, 31, 51, 81, 96) “providing to the customer one or more other items indicated by the one or more item selection criteria, wherein a total current number of items provided to the customer does not exceed the specified number . . .” (’450 patent, Claim 36)
“in response to receiving one or more items provided to a customer, providing the customer one or more other items indicated by one or more item selection criteria” (Request No. 89)	“in response to receiving any of the items provided to the customer, providing to the customer one or more other items indicated by the one or more item selection criteria . . .” (’450 patent, Claims 1, 16)
“rental of items to a customer in which the total current number of items provided to the customer did not exceed a specified number” (Request No. 90)	“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34], wherein a number of movies delivered to the customer and not yet returned does not exceed the specified number.” (’381 patent, Claims 10, 23, 33, 43) “A computer system as recited in claim 44, wherein a number of movies delivered to the customer and not yet returned does not exceed the specified number.” (’381 patent, Claim 51)
“computer-readable medium for renting items to customers” (Request No. 93)	“A computer-readable medium for renting items to customers . . .” (’450 patent, Claims 36, 81)
“computer-readable medium for renting items to customers that carried one or more sequences of instructions (Request No. 94)	“A computer-readable medium for renting items to customers, the computer-readable medium carrying one or more sequences of one or more instructions . . .” (’450 patent, Claims 36, 81)
“instructions that, when executed by one or more processors, caused one or more of them to perform steps for renting items to customers” (Request No. 95)	“instructions which, when executed by one or more processors, cause the one or more processors to perform the computer-implemented steps [described below].” (’450 patent, Claims 36, 81) “A computer system for renting movies to customers, comprising: . . one or more sequences of computer program instructions stored in the electronic digital memory which, when executed, cause the computer to perform the

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
	steps [described below].” (‘381 patent, Claim 44)
“apparatus for renting items to customers, the apparatus including one or more processors” (Request No. 96)	“An apparatus for renting items to customers comprising . . . one or more processors . . .” (‘450 patent, Claim 51)
“apparatus for renting items to customers, the apparatus including a memory communicatively coupled to the one or more processors, the memory including one or more sequences of one or more instructions which, when executed by the one or more processors, caused the one or more processors to perform steps” (Request No. 97)	“An apparatus for renting items to customers comprising . . . one or more processors; and a memory communicatively coupled to the one or more processors, the memory including one or more sequences of one or more instructions which, when executed by the one or more processors, cause the one or more processors to perform the steps [described below].” (‘450 patent, Claim 51)
“apparatus for renting items to customers comprising an item rental mechanism configured to perform steps” (Request No. 98)	“An apparatus for renting items to customers comprising an item rental mechanism configured to [perform steps described below].” (‘450 patent, Claim 66)
“rental of items to customers in which a total number of items provided to the customer within a specified period of time did not exceed a specified limit” (Request No. 99)	<p>“A method as recited in claim 1 [‘A method for renting items to customers . . .’], wherein a total number of items provided to the customer within a specified period of time does not exceed a specified limit.” (‘450 patent, Claim 2)</p> <p>“A method for renting items to customers, . . . wherein a total number of items provided to the customer within a specified period of time does not exceed a specified limit.” (‘450 patent, Claim 16)</p> <p>“A computer-readable medium as recited in claim 36 [‘A computer-readable medium for renting items to customers . . .’], wherein the total number of items provided to the customer within a specified period of time does not exceed a specified limit.” (‘450 patent, Claim 37)</p> <p>“An apparatus as recited in claim 66, wherein the total number of items provided to the customer within a specified period of time does not exceed a specified limit.” (‘450 patent, Claim 67)</p>
“rental of items to customers in which a total number of items provided to the customer within a specified period of time did not exceed a specified number” (Request No. 100)	<p>“renting items . . . providing to the customer up to a specified number of the one or more items indicated by the one or more item selection criteria . . .” (‘450 patent, Claims 1, 16, 51, 81)</p> <p>“renting items . . . providing to the customer one or more other items indicated by the one or more item selection criteria, wherein a total current number of items provided to the customer does not exceed the specified number . . .” (‘450 patent, Claim 36)</p> <p>“renting movies . . . providing to the customer up to a specified number of the one or more items indicated by the one or more item selection</p>

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
<p>“item selection criteria specifying one or more preferred item attributes” (Request No. 105)</p>	<p>criteria . . .” (‘450 patent, Claims 31, 96)</p> <p>“A method as recited in claim 1 [or 16], wherein . . . the one or more item selection criteria specifies one or more preferred item attributes . . .” (‘450 patent, Claims 6, 21)</p> <p>“A computer-readable medium as recited in claim 36 [or 81], wherein the one or more item selection criteria specifies one or more preferred item attributes . . .” (‘450 patent, Claims 41, 86)</p> <p>“An apparatus as recited in claim 51 [or 66], wherein the one or more item selection criteria specifies one or more preferred item attributes . . .” (‘450 patent, Claims 56, 71)</p>
<p>“in response to receiving a customer notification, providing the customer a second set of one or more items indicated by item selection criteria” (Request No. 113)</p>	<p>“A method as recited in claim 1 [or 16], further comprising in response to receiving a customer notification, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 8, 23)</p> <p>“A computer-readable medium as recited in claim 36, further comprising in response to receiving a customer notification, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claim 43)</p>
<p>“in response to expiration of a specified amount of time, providing a customer a second set of one or more items indicated by item selection criteria” (Request No. 114)</p>	<p>“A method as recited in claim 1 [or 16], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 9, 24)</p> <p>“A computer-readable medium as recited in claim 36 [or 81], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 44, 89)</p> <p>“An apparatus as recited in claim 51 [or 66], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 59, 74)</p>
<p>“in response to a specified date being reached, providing a customer a second set of one or more items indicated by item selection criteria” (Request No. 115)</p>	<p>“A method as recited in claim 1 [or 16], further comprising in response to a specified date being reached, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 10, 25)</p> <p>“A computer-readable medium as recited in claim 36 [or 81], further comprising in response</p>

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
	to a specified date being reached, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 45, 90) “An apparatus as recited in claim 51 [or 66], further comprising in response to a specified date being reached, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 60, 75)
“in response to a specified fee being received, providing a customer a second set of one or more items indicated by item selection criteria” (Request No. 116)	“A method as recited in claim 1 [or 16], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 11, 26) “A computer-readable medium as recited in claim 36 [or 81], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 46, 91) “An apparatus as recited in claim 51 [or 66], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” (‘450 patent, Claims 61, 76)
“providing rental items to a customer by mail” (Request No. 117)	“A method as recited in claim 1 [or 16], wherein items are provided to the customer by mail.” (‘450 patent, Claims 12, 27) “A computer-readable medium as recited in claim 36 [or 81], wherein items are provided to the customer by mail.” (‘450 patent, Claims 47, 92) “An apparatus as recited in claim 51 [or 66], wherein items are provided to the customer by mail.” (‘450 patent, Claims 66, 77)
“renting movies” (Request No. 119)	“A method for renting movies to customers . . .” (‘450 patent, Claim 31) “A computer-readable medium for renting movies to customers . . .” (‘450 patent, Claim 96) “A . . . method for renting movies to customers . . .” (‘381 patent, Claims 1, 14, 24, 34)

The Disputed Requests for Production and Netflix's Responses

55. The Requests for Production and Responses that are particularly in dispute in Blockbuster's present motion are set forth verbatim below. For the Court's convenience, they are grouped into four categories.

Documents Related to Netflix Patents and Applications or to Patent Rights Related to Blockbuster Online or to Netflix (Requests Nos. 3-5, 10-16, 46-49, and 52-54)

56. The text of each of these Requests and of each of Netflix's Written Responses to them is as follows:

REQUEST FOR PRODUCTION NO. 3:

All MATERIALS submitted to or received from the United States Patent and Trademark Office or any other patent office or agency in connection with any SUBJECT PATENT OR APPLICATION.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix further objects to Blockbuster's Request that it produce documents relating to prosecution of patents before patent offices or agencies other than the United States Patent and Trademark Office. The prosecution of patents that are not only not asserted in this case, but cannot be asserted here because they are being prosecuted and will be issued in a foreign country, is in no way relevant to any of the issues presented in this case.

Netflix objects to this Request as overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent

1 that it calls for information protected by the attorney-client privilege or the work product doctrine.
2 Further, Netflix objects to the extent that this Request duplicates prior Requests.

3 Subject to and without waiving the foregoing objections, Netflix will produce all
4 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
5 are locatable after a diligent search of all locations at which such materials might plausibly exist.

6 **REQUEST FOR PRODUCTION NO. 4:**

7 All files of NETFLIX, including any NETFLIX patent attorney or patent agent, for
8 any SUBJECT PATENT or APPLICATION.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

10 Netflix objects to Blockbuster's demand that it produce documents relating to its
11 patents and/or applications other than the patents-in-suit, because such patents/applications have
12 no relevance to any issue in this case. Netflix further objects to producing documents relating to
13 its patent applications that have not either been issued or been published on the grounds that the
14 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
15 information regarding Netflix's future business plans, and should not be produced to a company
16 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

17 Netflix also objects to this Request to the extent that it calls for information
18 protected by the attorney-client privilege or the work product doctrine. Further, Netflix objects to
19 the extent that this Request duplicates prior Requests.

20 Subject to and without waiving the foregoing objections, Netflix will produce all
21 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
22 are locatable after a diligent search of all locations at which such materials might plausibly exist.

23 **REQUEST FOR PRODUCTION NO. 5:**

24 All MATERIALS constituting, recording, referring to, or evidencing any assertion
25 of, or attempt to license, any SUBJECT APPLICATION OR PATENT.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

27 Netflix objects to Blockbuster's demand that it produce documents relating to its
28 patents and/or applications other than the patents-in-suit, because such patents/applications have

no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster.

Netflix objects to this Request as overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Further, Netflix objects to the extent that this Request duplicates prior Requests.

Subject to and without waiving the foregoing objections, Netflix will produce all nonprivileged, responsive documents so described and related to the '381 and '450 patents that are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 10:

All MATERIALS asserting, referring to or evidencing the scope of any SUBJECT APPLICATION OR PATENT or any aspect of the construction of any claim of any such application or patent.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster.

Netflix also objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Netflix further objects to this Request as vague and ambiguous with regard to "scope", and understands the term to refer to

1 construction of claims. To the extent that Blockbuster demands Netflix produce materials that
2 would evidence Netflix's construction of a claim, Netflix objects to the Request as premature in
3 that it seeks to impose upon Netflix a duty to come forward with a claim construction well prior
4 to the date provided for in the Court's Case Management Order and the Local Rules of this Court,
5 and objects to the Request as well as calling for a legal conclusion. Netflix objects to the extent
6 that this Request duplicates prior Requests.

7 Subject to and without waiving the foregoing objections, Netflix will produce all
8 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
9 are locatable after a diligent search of all locations at which such materials might plausibly exist.

10 **REQUEST FOR PRODUCTION NO. 11:**

11 All MATERIALS asserting, referring to or evidencing the patentability or
12 unpatentability of any SUBJECT APPLICATION OR PATENT or of any claim of any such
13 application or patent.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

15 Netflix objects to Blockbuster's demand that it produce documents relating to its
16 patents and/or applications other than the patents-in-suit, because such patents/applications have
17 no relevance to any issue in this case. Netflix further objects to producing documents relating to
18 its patent applications that have not either been issued or been published on the grounds that the
19 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
20 information regarding Netflix's future business plans, and should not be produced to a company
21 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

22 Netflix objects to this Request to the extent that it calls for information protected
23 by the attorney-client privilege or the work product doctrine. Further, Netflix objects to the
24 extent that this Request duplicates prior Requests. Netflix further objects as the demand for
25 materials "evidencing patentability or unpatentability" is vague, ambiguous, and calls for a legal
26 conclusion.

27 Subject to and without waiving the foregoing objections, Netflix will produce all
28 nonprivileged, responsive documents so described and related to the '381 and '450 patents that

are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 12:

All MATERIALS asserting, referring to or evidencing the patentability or unpatentability of any method performed by NETFLIX or of any related apparatus or computer-readable medium.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

Netflix objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Netflix further objects to this Request as the phrases “any method performed” or “any related apparatus or computer-readable medium” is vague and ambiguous. Netflix further objects as the demand for materials “evidencing the patentability or unpatentability” is vague, ambiguous, and calls for a legal conclusion.

Netflix also objects to this Request as overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. To the extent this Request seeks material relevant to the subject matter of this action, Netflix objects that this Request duplicates prior Requests.

REQUEST FOR PRODUCTION NO. 13:

All MATERIALS constituting, recording, referring to, or evidencing COMMUNICATIONS between W. Reed Hastings and Edward Stead concerning any SUBJECT PATENT or APPLICATION.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Netflix objects to Blockbuster’s demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix’s future business plans, and should not be produced to a company

1 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
2 further objects to the extent that these materials are in Blockbuster's possession.

3 Subject to and without waiving the foregoing objections, Netflix will produce all
4 non-privileged, responsive documents so described and related to the '381 and '450 patents that
5 are locatable after a diligent search of all locations at which such materials might plausibly exist.

6 **REQUEST FOR PRODUCTION NO. 14:**

7 All MATERIALS constituting, recording, referring to, or evidencing
8 COMMUNICATIONS between NETFLIX and BLOCKBUSTER concerning any SUBJECT
9 PATENT or APPLICATION.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

11 Netflix objects to Blockbuster's demand that it produce documents relating to its
12 patents and/or applications other than the patents-in-suit, because such patents/applications have
13 no relevance to any issue in this case. Netflix further objects to producing documents relating to
14 its patent applications that have not either been issued or been published on the grounds that the
15 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
16 information regarding Netflix's future business plans, and should not be produced to a company
17 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix also
18 objects to the extent that these materials are in Blockbuster's possession.

19 Subject to and without waiving the foregoing objections, Netflix will produce all
20 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
21 are locatable after a diligent search of all locations at which such materials might plausibly exist.

22 **REQUEST FOR PRODUCTION NO. 15:**

23 All MATERIALS constituting, recording, referring to, or evidencing
24 COMMUNICATIONS concerning any patent rights, patent license, or patent infringement related
25 to Blockbuster Online.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

27 Netflix objects to this Request as overly broad and unduly burdensome, seeking
28 material that is irrelevant to the subject matter of this action and is not reasonably calculated to

1 lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent
2 that it calls for information protected by the attorney-client privilege or the work product doctrine.

3 Subject to and without waiving the foregoing objections, Netflix will produce all
4 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
5 are locatable after a diligent search of all locations at which such materials might plausibly exist.

6 **REQUEST FOR PRODUCTION NO. 16:**

7 All MATERIALS constituting, recording, referring to, or evidencing
8 COMMUNICATIONS concerning any patent rights, patent license, or patent infringement related
9 to NETFLIX.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

11 Netflix objects to this Request to the extent that it seeks documents relating to its
12 patents and/or applications other than the patents-in-suit, because such patents/applications have
13 no relevance to any issue in this case. Netflix further objects to producing documents relating to
14 its latent applications that have not either been issued or been published on the grounds that the
15 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
16 information regarding Netflix's future business plans, and should not be produced to a company
17 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

18 Netflix objects to this Request on the grounds that it is overly broad and unduly
19 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
20 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
21 this Request to the extent that it calls for information protected by the attorney-client privilege or
22 the work product doctrine.

23 **REQUEST FOR PRODUCTION NO. 46:**

24 All MATERIALS constituting, recording, referring to, or evidencing submission
25 of any prior art reference or other information to the United States Patent and Trademark Office
26 or any other patent office or agency in connection with any SUBJECT APPLICATION OR
27 PATENT.

28 **RESPONSE TO REQUEST FOR PRODUCTION NO. 46:**

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix further objects to Blockbuster's Request that it produce documents relating to prosecution of patents before patent offices or agencies other than the United States Patent and Trademark Office. The prosecution of patents that are not only not asserted in this case, but cannot be asserted here because they are being prosecuted and will be issued in a foreign country, is in no way relevant to any of the issues presented in this case.

Netflix objects to this Request on the grounds that it is overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Netflix also objects to the extent that this Request duplicates prior Requests.

Subject to and without waiving the foregoing objections, Netflix will produce all nonprivileged, responsive documents so described and related to the '381 and '450 patents that are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 47:

All MATERIALS constituting, recording, referring to, or evidencing any failure or omission to submit any prior art reference or other information to the United States Patent and Trademark Office in connection with the '041 APPLICATION or '450 PATENT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 47:

Netflix objects as the phrase "failure or omission to submit any prior art reference" is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to

the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

REQUEST FOR PRODUCTION NO. 48:

All MATERIALS constituting, recording, referring to, or evidencing any failure or omission to submit any prior art reference or other information to the United States Patent and Trademark Office in connection with the '727 APPLICATION or '381 PATENT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 48:

Netflix objects as the phrase "failure or omission to submit any prior art reference" is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

///

REQUEST FOR PRODUCTION NO. 49:

All MATERIALS constituting, recording, referring to, or evidencing any failure or omission to submit any prior art reference or other information to the United States Patent and Trademark Office or any other patent office or agency in connection with any SUBJECT APPLICATION OR PATENT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 49:

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix further objects to Blockbuster's Request that it produce documents relating to prosecution of patents before patent offices or agencies other than the United States Patent and Trademark Office. The prosecution of patents that are not only not asserted in this case, but cannot be

1 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
2 way relevant to any of the issues presented in this case.

3 Netflix objects as the phrase “failure or omission to submit any prior art reference”
4 is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to
5 the extent that it calls for information protected by the attorney-client privilege or the work
6 product doctrine.

7 **REQUEST FOR PRODUCTION NO. 52:**

8 All MATERIALS constituting, recording, referring to, or evidencing any reason or
9 justification for submitting or not submitting any prior art reference or other information to the
10 United States Patent and Trademark Office or any other patent office or agency in connection
11 with any SUBJECT APPLICATION OR PATENT.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 52:**

14 Netflix objects to Blockbuster’s demand that it produce documents relating to its
15 patents and/or applications other than the patents-in-suit, because such patents/applications have
16 no relevance to any issue in this case. Netflix further objects to producing documents relating to
17 its patent applications that have not either been issued or been published on the grounds that the
18 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
19 information regarding Netflix’s future business plans, and should not be produced to a company
20 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
21 further objects to Blockbuster’s Request that it produce documents relating to prosecution of
22 patents before patent offices or agencies other than the United States Patent and Trademark
23 Office. The prosecution of patents that are not only not asserted in this case, but cannot be
24 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
25 way relevant to any of the issues presented in this case.

26 Netflix objects to this Request on the grounds that it is overly broad and unduly
27 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
28 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to

1 this Request to the extent that it calls for information protected by the attorney-client privilege or
2 the work product doctrine. Netflix also objects to the extent that this Request duplicates prior
3 Requests.

4 Subject to and without waiving the foregoing objections, Netflix will produce all
5 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
6 are locatable after a diligent search of all locations at which such materials might plausibly exist.

7 **REQUEST FOR PRODUCTION NO. 53:**

8 All MATERIALS asserting, recording, referring to, or evidencing any failure or
9 omission by NETFLIX to submit any prior art reference or other information to the United States
10 Patent and Trademark Office or any other patent office or agency.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 53:**

12 Netflix objects to Blockbuster's Request that it produce documents relating to
13 prosecution of patents before patent offices or agencies other than the United States Patent and
14 Trademark Office. The prosecution of patents that are not only not asserted in this case, but
15 cannot be asserted here because they are being prosecuted and will be issued in a foreign country,
16 is in no way relevant to any of the issues presented in this case. Netflix further objects as the
17 phrase "failure or omission . . . to submit any prior art reference" is vague, ambiguous, and calls
18 for a legal conclusion.

19 Netflix objects to this Request on the grounds that it is overly broad and unduly
20 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
21 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
22 this Request to the extent that it calls for information protected by the attorney-client privilege or
23 the work product doctrine. Netflix also objects to the extent that this Request duplicates prior
24 Requests.

25 **REQUEST FOR PRODUCTION NO. 54:**

26 All MATERIALS asserting, recording, referring to, or evidencing any failure or
27 omission by NETFLIX or any PERSON UNDER A DUTY OF CANDOR to submit any prior art
28 reference or other information to the United States Patent and Trademark Office or any other

1 patent office or agency.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 54:**

3 Netflix objects to Blockbuster's Request that it produce documents relating to
4 prosecution of patents before patent offices or agencies other than the United States Patent and
5 Trademark Office. The prosecution of patents that are not only not asserted in this case, but
6 cannot be asserted here because they are being prosecuted and will be issued in a foreign country,
7 is in no way relevant to any of the issues presented in this case. Netflix further objects as the
8 phrase "failure or omission . . . to submit any prior art reference" is vague, ambiguous, and calls
9 for a legal conclusion.

10 Netflix objects to this Request on the grounds that it is overly broad and unduly
11 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
12 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
13 the extent that this Request duplicates prior Requests.

14 **Documents Relating to Preferential Selection Methodologies Referred to as**
15 **"Throttling" (Requests Nos. 24-26 and 128-29)**

16 57. The text of each of these requests and of each of Netflix's written
17 responses to them is as follows:

18 **REQUEST FOR PRODUCTION NO. 24:**

19 All MATERIALS filed, served, and produced for inspection by an adverse party in
20 *Frank Chavez v. Netflix, Inc.*, San Francisco Superior Court Case No. CGC 04-434884, and any
21 transcripts or other records of any discovery or proceedings in that case.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

23 Netflix objects to this Request on the grounds that it seeks material that is
24 irrelevant to the subject matter of this action and is not reasonably calculated to lead to the
25 discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls
26 for information protected by the attorney-client privilege or the work product doctrine.

27 **REQUEST FOR PRODUCTION NO. 25:**

28 All MATERIALS constituting, recording, referring to, or evidencing

1 COMMUNICATIONS between the parties in *Frank Chavez v. Netflix, Inc.*, San Francisco
 2 Superior Court Case No. CGC 04-434884, or their respective counsel.

3 **RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

4 Netflix objects that this Request seeks material that is irrelevant to the subject
 5 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 6 evidence. Netflix further objects to this Request to the extent that it calls for information
 7 protected by the attorney-client privilege or the work product doctrine.

8 **REQUEST FOR PRODUCTION NO. 26:**

9 All MATERIALS constituting, referring to, recording, or evidencing any
 10 settlement negotiations concerning *Frank Chavez v. Netflix, Inc.*, San Francisco Superior Court
 11 Case No. CGC 04-434884.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

14 Netflix objects that this Request seeks material that is irrelevant to the subject
 15 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 16 evidence. Netflix further objects to this Request to the extent that it calls for information
 17 protected by the attorney-client privilege or the work product doctrine.

18 **REQUEST FOR PRODUCTION NO. 128:**

19 All MATERIALS asserting, evidencing, reflecting, o[r] referring to any use by
 20 NETFLIX of any practice known as “throttling” on or before April 28, 2000.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 128:**

22 Netflix objects to this Request as seeking material that is irrelevant to the subject
 23 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 24 evidence. Netflix further objects to this Request to the extent that it calls for information
 25 protected by the attorney-client privilege or the work product doctrine.

26 **REQUEST FOR PRODUCTION NO. 129:**

27 All MATERIALS asserting, evidencing, reflecting, or referring to any use by
 28 NETFLIX of any practice known as “throttling” on or before May 14, 2003.

RESPONSE TO REQUEST FOR PRODUCTION NO. 129:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

Documents Related to Delivery by the Postal Service (Requests Nos. 130-32)

58. The text of each of these requests and of each of Netflix's written responses to them is as follows:

REQUEST FOR PRODUCTION NO. 130:

All MATERIALS asserting, evidencing, reflecting, or referring to any preferential sorting or handling of NETFLIX mail.

RESPONSE TO REQUEST FOR PRODUCTION NO. 130:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

REQUEST FOR PRODUCTION NO. 131:

All MATERIALS evidencing, reflecting, or referring to any COMMUNICATIONS between NETFLIX and any employee of the United States Postal Service concerning any preferential sorting or handling of NETFLIX mail.

RESPONSE TO REQUEST FOR PRODUCTION NO. 131:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

REQUEST FOR PRODUCTION NO. 132:

All MATERIALS evidencing, reflecting, or referring to any COMMUNICATIONS between William J. Henderson and the United States Postal Service

1 concerning NETFLIX.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 132:**

3 Netflix objects to this Request as seeking material that is irrelevant to the subject
4 matter of this action and is not reasonably calculated to lead to the discovery of admissible
5 evidence. Netflix further objects to this Request to the extent that it calls for information
6 protected by the attorney-client privilege or the work product doctrine.

7 **Documents Related to Prior Art Known to Netflix (Requests Nos. 32, 34-36, 55-57,
8 67-71, 73-74, 78-81, 86, 88-90, 93-100, 105, 113-17, and 119)**

9 59. The text of each of these requests and of each of Netflix's written
10 responses to them is as follows:

11 **REQUEST FOR PRODUCTION NO. 32:**

12 All MATERIALS referring to or evidencing HBO, Showtime, or any subscription
13 cable or satellite television service or pay television service in existence before April 28, 1999, or
14 referring to or evidencing any knowledge thereof by NETFLIX or any PERSON UNDER A
15 DUTY OF CANDOR at any time before April 4, 2006.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 32:**

17 Netflix objects to this Request on the grounds that it is overly broad and unduly
18 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
19 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
20 this Request to the extent that it calls for information protected by the attorney-client privilege or
21 the work product doctrine. Netflix also objects to this Request as vague and ambiguous with
22 regard to "any subscription cable or satellite television service or pay television service." Netflix
23 further objects to producing minutiae of a personal nature that are literally responsive to this
24 Request, such as any personal purchases orders of its employees from any subscription cable or
25 satellite television service or pay television service in existence before April 28, 1999.

26 Subject to and without waiving the foregoing objections, Netflix will produce all
27 nonprivileged, responsive documents that so reference "HBO" or "Showtime" and that are
28 locatable after a diligent search of all locations at which such materials might plausibly exist.

1 Further, Netflix is willing to meet and confer with Blockbuster in order to arrive at a narrowed
2 Request that could possibly yield additional materials relevant to this case without imposing the
3 burdens associated with this Request in its current form, but Netflix will not undertake to discern
4 a reasonable interpretation of, and engage in a corresponding search for responsive documents
5 that make any reference to, “any subscription cable or satellite television service or pay television
6 service in existence before April 28, 1999.”

7 **REQUEST FOR PRODUCTION NO. 34:**

8 All MATERIALS referring to or evidencing Webvan, Home Grocer.com, or any
9 Internet grocery service in existence before April 28, 1999, or referring to or evidencing any
10 knowledge thereof by NETFLIX or any PERSON UNDER A DUTY OF CANDOR of at any
11 time before April 4, 2006.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 34:**

13 Netflix objects to this Request on the grounds that it is overly broad and unduly
14 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
15 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
16 this Request to the extent that it calls for information protected by the attorney-client privilege or
17 the work product doctrine. Netflix also objects to this Request as vague and ambiguous with
18 regard to “any Internet grocery service.” Netflix further objects to producing minutiae of a
19 personal nature that are literally responsive to this Request, such as any personal purchases orders
20 of its employees from any Internet grocery service in existence before April 28, 1999.

21 Subject to and without waiving the foregoing objections, Netflix will produce all
22 nonprivileged, responsive documents that so reference “Webvan” or “Home Grocer” and that are
23 locatable after a diligent search of all locations at which such materials might plausibly exist.
24 Further, Netflix is willing to meet and confer with Blockbuster in order to arrive at a narrowed
25 Request that could possibly yield additional materials relevant to this case without imposing the
26 burdens associated with this Request in its current form, but Netflix will not undertake to discern
27 a reasonable interpretation of, and engage in a corresponding search for responsive documents
28 that make any reference to, “any Internet grocery service in existence before April 28, 1999.”

1 **REQUEST FOR PRODUCTION NO. 35:**

2 All MATERIALS referring to or evidencing Amazon.com or referring to or
3 evidencing any knowledge of Amazon.com by NETFLIX or any PERSON UNDER A DUTY OF
4 CANDOR at any time before April 4, 2006.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 35:**

6 Netflix objects to this Request on the grounds that it is overly broad and unduly
7 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
8 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
9 this Request to the extent that it calls for information protected by the attorney-client privilege or
10 the work product doctrine. Netflix further objects to producing minutiae of a personal nature that
11 are literally responsive to this Request, such as any personal purchases orders of its employees
12 from Amazon.com.

13 Subject to and without waiving the foregoing objections, Netflix will produce all
14 nonprivileged, responsive documents so described that are locatable after a diligent search of all
15 locations at which such materials might plausibly exist.

16 **REQUEST FOR PRODUCTION NO. 36:**

17 All MATERIALS referring to or evidencing eBay or referring to or evidencing
18 any knowledge of eBay by NETFLIX or any PERSON UNDER A DUTY OF CANDOR at any
19 time before April 4, 2006.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 36:**

21 Netflix objects to this Request on the grounds that it is overly broad and unduly
22 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
23 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
24 this Request to the extent that it calls for information protected by the attorney-client privilege or
25 the work product doctrine. Netflix further objects to producing minutiae of a personal nature that
26 are literally responsive to this Request, such as any personal purchases orders of its employees
27 from eBay.

28 Subject to and without waiving the foregoing objections, Netflix will produce all

1 non-privileged, responsive documents so described that are locatable after a diligent search of all
2 locations at which such materials might plausibly exist.

3 **REQUEST FOR PRODUCTION NO. 55:**

4 All MATERIALS constituting, recording, referring to, or evidencing any use,
5 description nor disclosure, prior to April 28, 1999, of any computer-implemented rental of movies
6 to a customer.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 55:**

8 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
9 this Request could be read to purport to require Netflix to conduct a search for and produce
10 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
11 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
12 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
13 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
14 construction well prior to the date provided for in the Court's Case Management Order and the
15 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
17 documents literally called for by the Request, without any further context, Netflix objects to the
18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
20 by requiring it to mount a search for and produce documents that could fall within the literal
21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
24 the burdens associated with a search for documents responsive to the Request in its current form,
25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 56:**

28 MATERIALS sufficient to fully describe any use, practice, description, or

1 disclosure, prior to April 28, 1999, of any computer-implemented rental of movies to customers.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 56:**

3 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
4 this Request could be read to purport to require Netflix to conduct a search for and produce
5 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
6 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
7 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
8 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
9 construction well prior to the date provided for in the Court's Case Management Order and the
10 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
11 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
12 documents literally called for by the Request, without any further context, Netflix objects to the
13 request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
14 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
15 by requiring it to mount a search for and produce documents that could fall within the literal
16 terms of snippets of the claims of its patents.

17 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
18 at a narrowed Request that could possibly yield materials relevant to this case without imposing
19 the burdens associated with a search for documents responsive to the Request in its current form,
20 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
21 corresponding search for documents responsive to, the Request as currently phrased.

22 **REQUEST FOR PRODUCTION NO. 57:**

23 MATERIALS sufficient to fully describe any use, practice, description, or
24 disclosure, prior to April 28, 1999, of providing electronic digital information that caused one of
25 more attributes of movies to be displayed.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 57:**

27 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
28 this Request could be read to purport to require Netflix to conduct a search for and produce

1 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
2 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
3 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
4 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
5 construction well prior to the date provided for in the Court's Case Management Order and the
6 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
7 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
8 documents literally called for by the Request, without any further context, Netflix objects to the
9 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
10 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
11 by requiring it to mount a search for and produce documents that could fall within the literal
12 terms of snippets of the claims of its patents.

13 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
14 at a narrowed Request that could possibly yield materials relevant to this case without imposing
15 the burdens associated with a search for documents responsive to the Request in its current form,
16 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
17 corresponding search for documents responsive to, the Request as currently phrased.

18 **REQUEST FOR PRODUCTION NO. 67:**

19 MATERIALS sufficient to fully describe any use, practice, description, or
20 disclosure, prior to April 28, 1999, of a rental agreement that provided for a periodic fee.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 67:**

22 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
23 this Request could be read to purport to require Netflix to conduct a search for and produce
24 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
25 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
26 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
27 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a laim
28 construction well prior to the date provided for in the Court's Case Management Order and the

1 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
2 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
3 documents literally called for by the Request, without any further context, Netflix objects to the
4 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
5 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
6 by requiring it to mount a search for and produce documents that could fall within the literal
7 terms of snippets of the claims of its patents.

8 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
9 at a narrowed Request that could possibly yield materials relevant to this case without imposing
10 the burdens associated with a search for documents responsive to the Request in its current form,
11 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
12 corresponding search for documents responsive to, the Request as currently phrased.

13 **REQUEST FOR PRODUCTION NO. 68:**

14 MATERIALS sufficient to fully describe any use, practice, description, or
15 disclosure, prior to April 28, 1999, of establishing a rental agreement over the Internet.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 68:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
18 this Request could be read to purport to require Netflix to conduct a search for and produce
19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
23 construction well prior to the date provided for in the Court's Case Management Order and the
24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
26 documents literally called for by the Request, without any further context, Netflix objects to the
27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
28 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix

1 by requiring it to mount a search for and produce documents that could fall within the literal
2 terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
5 the burdens associated with a search for documents responsive to the Request in its current form,
6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 69:**

9 All MATERIALS constituting, recording, referring to, or evidencing any use
10 practice, description, or disclosure, prior to April 28, 1999, of shipping a movie only if a fee was
11 current.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 69:**

14 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
15 this Request could be read to purport to require Netflix to conduct a search for and produce
16 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
17 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
18 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
19 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
20 construction well prior to the date provided for in the Court's Case Management Order and the
21 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
22 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
23 documents literally called for by the Request, without any further context, Netflix objects to the
24 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
25 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
26 by requiring it to mount a search for and produce documents that could fall within the literal
27 terms of snippets of the claims of its patents.

28 Although Netflix is willing to meet and confer with Blockbuster in order to arrive

1 at a narrowed Request that could possibly yield materials relevant to this case without imposing
2 the burdens associated with a search for documents responsive to the Request in its current form,
3 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
4 corresponding search for documents responsive to, the Request as currently phrased.

5 **REQUEST FOR PRODUCTION NO. 70:**

6 MATERIALS sufficient to fully describe any use, practice, description, or
7 disclosure, prior to April 28, 1999, of any computer system for renting movies.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 70:**

9 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
10 this Request could be read to purport to require Netflix to conduct a search for and produce
11 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
12 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
13 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
14 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
15 construction well prior to the date provided for in the Court's Case Management Order and the
16 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
17 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
18 documents literally called for by the Request, without any further context, Netflix objects to the
19 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
20 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
21 by requiring it to mount a search for and produce documents that could fall within the literal
22 terms of snippets of the claims of its patents.

23 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
24 at a narrowed Request that could possibly yield materials relevant to this case without imposing
25 the burdens associated with a search for documents responsive to the Request in its current form,
26 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
27 corresponding search for documents responsive to, the Request as currently phrased.
28

1 **REQUEST FOR PRODUCTION NO. 71:**

2 MATERIALS sufficient to fully describe any use, practice, description, or
3 disclosure, prior to April 28, 1999, of renting movies using a computer coupled to a digital
4 telecommunications network.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 71:**

6 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
7 this Request could be read to purport to require Netflix to conduct a search for and produce
8 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
9 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
10 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
11 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
12 construction well prior to the date provided for in the Court's Case Management Order and the
13 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
14 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
15 documents literally called for by the Request, without any further context, Netflix objects to the
16 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
17 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
18 by requiring it to mount a search for and produce documents that could fall within the literal
19 terms of snippets of the claims of its patents.

20 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
21 at a narrowed Request that could possibly yield materials relevant to this case without imposing
22 the burdens associated with a search for documents responsive to the Request in its current form,
23 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
24 corresponding search for documents responsive to, the Request as currently phrased.

25 **REQUEST FOR PRODUCTION NO. 72:**

26 MATERIALS sufficient to fully describe any use, practice, description, or
27 disclosure, prior to April 28, 1999, of renting movies using a computer coupled to a digital
28 telecommunications network.

RESPONSE TO REQUEST FOR PRODUCTION NO. 72:

Refer to Netflix's response to Request for Production No. 71.

REQUEST FOR PRODUCTION NO. 73:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of renting movies using a computer with electronic digital memory.

RESPONSE TO REQUEST FOR PRODUCTION NO. 73:

Refer to Netflix's response to Request for Production No. 70

REQUEST FOR PRODUCTION NO. 74:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of renting movies using a computer with programs stored in memory causing the computer to perform steps.

///

RESPONSE TO REQUEST FOR PRODUCTION NO. 74:

Refer to Netflix's response to Request for Production No. 70.

REQUEST FOR PRODUCTION NO. 78:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of any computer-implemented method in which two or more movies for renting to a customer are selected by a customer.

RESPONSE TO REQUEST FOR PRODUCTION NO. 78:

Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand, this Request could be read to purport to require Netflix to conduct a search for and produce materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may or may not eventually be in dispute in order to respond to this Request, Netflix objects to the Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim construction well prior to the date provided for in the Court's Case Management Order and the Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.

1 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
2 documents literally called for by the Request, without any further context, Netflix objects to the
3 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
4 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
5 by requiring it to mount a search for and produce documents that could fall within the literal
6 terms of snippets of the claims of its patents.

7 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
8 at a narrowed Request that could possibly yield materials relevant to this case without imposing
9 the burdens associated with a search for documents responsive to the Request in its current form,
10 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
11 corresponding search for documents responsive to, the Request as currently phrased.

12 **REQUEST FOR PRODUCTION NO. 79:**

13 All MATERIALS constituting, recording, referring to, or evidencing any use,
14 practice, description, or disclosure, prior to April 28, 1999, of determining the order of two or
15 more movies based upon one or more preferences of a customer.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 79:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
18 this Request could be read to purport to require Netflix to conduct a search for and produce
19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
23 construction well prior to the date provided for in the Court's Case Management Order and the
24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
26 documents literally called for by the Request, without any further context, Netflix objects to the
27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
28 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix

1 by requiring it to mount a search for and produce documents that could fall within the literal
2 terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
5 the burdens associated with a search for documents responsive to the Request in its current form,
6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 80:**

9 MATERIALS sufficient to fully describe any use, practice, description, or
10 disclosure, prior to April 28, 1999, of any delivery of a selected movie by mail.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 80:**

12 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
13 this Request could be read to purport to require Netflix to conduct a search for and produce
14 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
15 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
16 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
17 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
18 construction well prior to the date provided for in the Court's Case Management Order and the
19 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
20 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
21 documents literally called for by the Request, without any further context, Netflix objects to the
22 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
23 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
24 by requiring it to mount a search for and produce documents that could fall within the literal
25 terms of snippets of the claims of its patents.

26 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
27 at a narrowed Request that could possibly yield materials relevant to this case without imposing
28 the burdens associated with a search for documents responsive to the Request in its current form,

1 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
2 corresponding search for documents responsive to, the Request as currently phrased.

3 **REQUEST FOR PRODUCTION NO. 81:**

4 MATERIALS sufficient to fully describe any use, practice, description, or
5 disclosure, prior to April 28, 1999, of any delivery of a selected movie by mail on one or more
6 optical media.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 81:**

8 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
9 this Request could be read to purport to require Netflix to conduct a search for and produce
10 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
11 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
12 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
13 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
14 construction well prior to the date provided for in the Court's Case Management Order and the
15 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
17 documents literally called for by the Request, without any further context, Netflix objects to the
18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
20 by requiring it to mount a search for and produce documents that could fall within the literal
21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
24 the burdens associated with a search for documents responsive to the Request in its current form,
25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 86:**

28 MATERIALS sufficient to fully describe any use, practice, description, or

1 disclosure, prior to April 28, 1999, of rental of any of motion pictures, television series,
2 documentaries, cartoons, music videos, video recordings of concert performances, instructional
3 programs, or educational programs.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 86:**

5 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
6 this Request could be read to purport to require Netflix to conduct a search for and produce
7 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
8 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
9 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
10 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
11 construction well prior to the date provided for in the Court's Case Management Order and the
12 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
13 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
14 documents literally called for by the Request, without any further context, Netflix objects to the
15 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
16 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
17 by requiring it to mount a search for and produce documents that could fall within the literal
18 terms of snippets of the claims of its patents.

19 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
20 at a narrowed Request that could possibly yield materials relevant to this case without imposing
21 the burdens associated with a search for documents responsive to the Request in its current form,
22 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
23 corresponding search for documents responsive to, the Request as currently phrased.

24 **REQUEST FOR PRODUCTION NO. 88:**

25 MATERIALS sufficient to fully describe any use, practice, description, or
26 disclosure, prior to April 28, 1999, of providing a customer up to a specified number of items
27 indicated by one or more selection criteria.

28 **RESPONSE TO REQUEST FOR PRODUCTION NO. 88:**

Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand, this Request could be read to purport to require Netflix to conduct a search for and produce materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may or may not eventually be in dispute in order to respond to this Request, Netflix objects to the Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim construction well prior to the date provided for in the Court's Case Management Order and the Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion. Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all documents literally called for by the Request, without any further context, Netflix objects to the Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix by requiring it to mount a search for and produce documents that could fall within the literal terms of snippets of the claims of its patents.

Although Netflix is willing to meet and confer with Blockbuster in order to arrive at a narrowed Request that could possibly yield materials relevant to this case without imposing the burdens associated with a search for documents responsive to the Request in its current form, Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a corresponding search for documents responsive to, the Request as currently phrased.

REQUEST FOR PRODUCTION NO. 89:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of, in response to receiving one or more items provided to a customer, providing the customer one or more other items indicated by one or more item selection criteria.

RESPONSE TO REQUEST FOR PRODUCTION NO. 89:

Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand, this Request could be read to purport to require Netflix to conduct a search for and produce materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To

1 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 2 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 3 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 4 construction well prior to the date provided for in the Court's Case Management Order and the
 5 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 6 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 7 documents literally called for by the Request, without any further context, Netflix objects to the
 8 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 9 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 10 by requiring it to mount a search for and produce documents that could fall within the literal
 11 terms of snippets of the claims of its patents.

12 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 13 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 14 the burdens associated with a search for documents responsive to the Request in its current form,
 15 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 16 corresponding search for documents responsive to, the Request as currently phrased.

17 **REQUEST FOR PRODUCTION NO. 90:**

18 All MATERIALS constituting, recording, referring to, or evidencing any use,
 19 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to a customer in
 20 which the total current number of items provided to the customer did not exceed a specified
 21 number.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 90:**

23 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 24 this request could be read to purport to require Netflix to conduct a search for and produce
 25 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 26 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 27 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 28 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim

1 construction well prior to the date provided for in the Court's Case Management Order and the
2 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
3 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
4 Documents literally called for by the Request, without any further context, Netflix objects to the
5 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
6 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
7 by requiring it to mount a search for and produce documents that could fall within the literal
8 terms of snippets of the claims of its patents.

9 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
10 at a narrowed Request that could possibly yield materials relevant to this case without imposing
11 the burdens associated with a search for documents responsive to the Request in its current form,
12 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
13 corresponding search for documents responsive to, the Request as currently phrased.

14 **REQUEST FOR PRODUCTION NO. 93:**

15 MATERIALS sufficient to fully describe any use, practice, description, or
16 disclosure, prior to April 28, 1999, of a computer-readable medium for renting items to
17 customers.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 93:**

19 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
20 this Request could be read to purport to require Netflix to conduct a search for and produce
21 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
22 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element, this
23 Request is irrelevant, as Netflix has not asserted a claim containing the above language.
24 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
25 documents literally called for by the Request, without any further context, Netflix objects to the
26 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
27 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
28 by requiring it to mount a search for and produce documents that could fall within the literal

1 terms of snippets of the claims of its patents.

2 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
3 at a narrowed Request that could possibly yield materials relevant to this case without imposing
4 the burdens associated with a search for documents responsive to the Request in its current form,
5 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
6 corresponding search for documents responsive to, the Request as currently phrased.

7 **REQUEST FOR PRODUCTION NO. 94:**

8 MATERIALS sufficient to fully describe any use, practice, description, or
9 disclosure, prior to April 28, 1999, of a computer-readable medium for renting items to customers
10 that carried one or more sequences of instructions.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 94:**

12 Refer to Netflix's response to Request for Production No. 93.

13 ///

14 **REQUEST FOR PRODUCTION NO. 95:**

15 MATERIALS sufficient to fully describe any use, practice, description, or
16 disclosure, prior to April 28, 1999, of instructions that, when executed by one or more processors,
17 caused one or more of them to perform steps for renting items to customers.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 95:**

19 Refer to Netflix's response to Request for Production No. 93.

20 **REQUEST FOR PRODUCTION NO. 96:**

21 MATERIALS sufficient to fully describe any use, practice, description, or
22 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers, the apparatus
23 including one or more processors.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 96:**

25 Refer to Netflix's response to Request for Production No. 93.

26 **REQUEST FOR PRODUCTION NO. 97:**

27 MATERIALS sufficient to fully describe any use, practice, description, or
28 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers, the apparatus

1 including a memory communicatively coupled to the one or more processors, the memory
2 including one or more sequences of one or more instructions which, when executed by the one or
3 more processors, caused the one or more processors to perform steps.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 97:**

5 Refer to Netflix's response to Request for Production No. 93.

6 **REQUEST FOR PRODUCTION NO. 98:**

7 MATERIALS sufficient to fully describe any use, practice, description, or
8 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers comprising an
9 item rental mechanism configured to perform steps.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 98:**

11 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
12 this Request could be read to purport to require Netflix to conduct a search for and produce
13 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
14 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element, this
15 Request is irrelevant, as Netflix has not asserted a claim containing the above language.
16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
17 documents literally called for by the Request, without any further context, Netflix objects to the
18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
20 by requiring it to mount a search for and produce documents that could fall within the literal
21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
24 the burdens associated with a search for documents responsive to the Request in its current form,
25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 99:**

28 All MATERIALS constituting, recording, referring to, or evidencing any use,

1 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to customers in
2 which a total number of items provided to the customer within a specified period of time did not
3 exceed a specified limit.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 99:**

5 Refer to Netflix's response to Request for Production No. 90.

6 **REQUEST FOR PRODUCTION NO. 100:**

7 All MATERIALS constituting, recording, referring to, or evidencing any use,
8 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to customers in
9 which a total number of items provided to the customer within a specified period of time did not
10 exceed a specified number.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 100:**

12 Refer to Netflix's response to Request for Production No. 99.

13 ///

14 **REQUEST FOR PRODUCTION NO. 105:**

15 All MATERIALS constituting, recording, referring to, or evidencing any use,
16 practice, description, or disclosure, prior to April 28, 1999, of item selection criteria specifying
17 one or more preferred item attributes.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 105:**

19 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
20 this Request could be read to purport to require Netflix to conduct a search for and produce
21 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
22 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
23 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
24 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
25 construction well prior to the date provided for in the Court's Case Management Order and the
26 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
27 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
28 documents literally called for by the Request, without any further context, Netflix objects to the

1 request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
2 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
3 by requiring it to mount a search for and produce documents that could fall within the literal
4 terms of snippets of the claims of its patents.

5 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
6 at a narrowed Request that could possibly yield materials relevant to this case without imposing
7 the burdens associated with a search for documents responsive to the Request in its current form,
8 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
9 corresponding search for documents responsive to, the Request as currently phrased.

10 **REQUEST FOR PRODUCTION NO. 113:**

11 All MATERIALS constituting, recording, referring to, or evidencing any use,
12 practice, description, or disclosure, prior to April 28, 1999, of, in response to receiving a customer
13 notification, providing the customer a second set of one or more items indicated by item selection
14 criteria.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 113:**

16 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
17 this Request could be read to purport to require Netflix to conduct a search for and produce
18 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
19 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
20 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
21 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
22 construction well prior to the date provided for in the Court's Case Management Order and the
23 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
24 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
25 documents literally called for by the Request, without any further context, Netflix objects to the
26 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
27 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
28 by requiring it to mount a search for and produce documents that could fall within the literal

1 terms of snippets of the claims of its patents.

2 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
3 at a narrowed Request that could possibly yield materials relevant to this case without imposing
4 the burdens associated with a search for documents responsive to the Request in its current form,
5 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
6 corresponding search for documents responsive to, the Request as currently phrased.

7 **REQUEST FOR PRODUCTION NO. 114:**

8 All MATERIALS constituting, recording, referring to, or evidencing any use,
9 practice, description, or disclosure, prior to April 28, 1999, of, in response to expiration of a
10 specified amount of time, providing a customer a second set of one or more items indicated by
11 item selection criteria.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 114:**

13 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
14 this Request could be read to purport to require Netflix to conduct a search for and produce
15 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
16 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
17 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
18 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
19 construction well prior to the date provided for in the Court's Case Management Order and the
20 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
21 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
22 documents literally called for by the Request, without any further context, Netflix objects to the
23 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
24 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
25 by requiring it to mount a search for and produce documents that could fall within the literal
26 terms of snippets of the claims of its patents.

27 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
28 at a narrowed Request that could possibly yield materials relevant to this case without imposing

1 the burdens associated with a search for documents responsive to the Request in its current form,
2 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
3 corresponding search for documents responsive to, the Request as currently phrased.

4 **REQUEST FOR PRODUCTION NO. 115:**

5 All MATERIALS constituting, recording, referring to, or evidencing any use,
6 practice, description, or disclosure, prior to April 28, 1999, of, in response to a specified date
7 being reached, providing a customer a second set of one or more items indicated by item selection
8 criteria.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 115:**

10 Refer to Netflix's response to Request for Production No. 114.

11 **REQUEST FOR PRODUCTION NO. 116:**

12 All MATERIALS constituting, recording, referring to, or evidencing any use,
13 practice, description, or disclosure, prior to April 28, 1999, of, in response to a specified fee being
14 received, providing a customer a second set of one or more items indicated by item selection
15 criteria.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 116:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
18 this Request could be read to purport to require Netflix to conduct a search for and produce
19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
23 construction well prior to the date provided for in the Court's Case Management Order and the
24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
26 Documents literally called for by the Request, without any further context, Netflix objects to the
27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
28 Discovery of admissible evidence. This Request is nothing more than an attempt to harass

1 Netflix by requiring it to mount a search for and produce documents that could fall within the
2 literal terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
5 the burdens associated with a search for documents responsive to the Request in its current form,
6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 117:**

9 MATERIALS sufficient to fully describe any use, practice, description, or
10 disclosure, prior to April 28, 1999, of providing rental items to a customer by mail.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 117:**

12 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
13 this Request could be read to purport to require Netflix to conduct a search for and produce
14 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
15 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
16 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
17 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
18 construction well prior to the date provided for in the Court's Case Management Order and the
19 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
20 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
21 documents literally called for by the Request, without any further context, Netflix objects to the
22 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
23 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
24 by requiring it to mount a search for and produce documents that could fall within the literal
25 terms of snippets of the claims of its patents.

26 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
27 at a narrowed Request that could possibly yield materials relevant to this case without imposing
28 the burdens associated with a search for documents responsive to the Request in its current form,

1 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
2 corresponding search for documents responsive to, the Request as currently phrased.

3 **REQUEST FOR PRODUCTION NO. 119:**

4 MATERIALS sufficient to fully describe any use, practice, description, or
5 disclosure, prior to April 28, 1999, of renting movies.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 119:**

7 Refer to Netflix's response to Request for Production No. 86.

8 I declare under penalty of perjury under the laws of the United States that the
9 foregoing is true and correct.

10 Executed on November 3, 2005 at Santa Monica, California.

11 _____/S/_____
12 William J. O'Brien